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CHARLES ELMORE
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. [redacted] 39.

J. R. WHEELER, Petitioner,

vs.

HOWARD GREENE, Receiver of the Bankers Joint Stock Land Bank of Milwaukee, Wisconsin.

ON CERTIORARI TO C. C. A. 7TH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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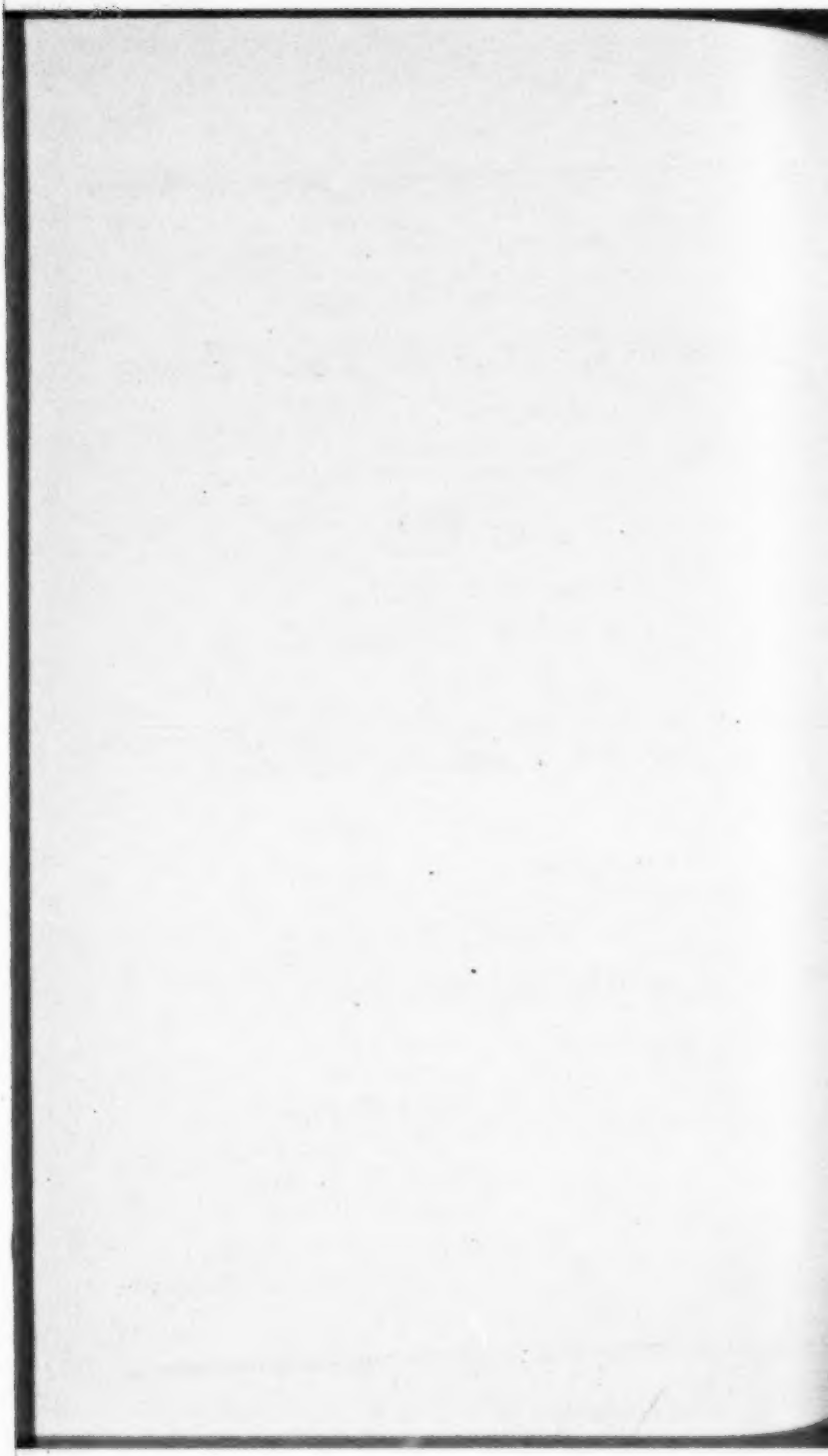

SUBJECT INDEX.

Administrative Powers 1
Section 641 2
Section 651 6
Section 831 (i) 7
Section 831 (j) 8
Cases cited by Respondent distinguished..... 15
Enforcement of Shareholders' liability 18
Legislative method 23

TABLE OF CASES.

Brazell v. Zeigler, 26 Okla. 826, 110 Pac. 1052, 1054-5..... 3
Brown v. Trail, 89 Fed. 641..... 22
Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, distinguished 17
Clapp v. Smith, 22 N. M. 153, 159 Pac. 523..... 22
Colton v. Mayer, 90 Md. 711, 45 Atl. 874..... 22
Cosmos Exploration v. Gray Eagle, 190 U. S. 301, distinguished..16
Hammond v. Cline, 170 Ind. 452, 84 N. E. 827..... 22
Hynes v. Illinois Trust & Savings Bank, 226 Ill. 95, 80 N. E. 472, distinguished 21
King v. Armstrong, 50 Ohio St. 222, 34 N. E. 163, distinguished 21
Knight v. U. S. Land Association, 142 U. S. 161, distinguished 17
McNeill v. Pace, 69 Fla. 349, 68 So. 177, distinguished.....19
19 Opinion Attorney General 686 17
Orchard v. Alexander, 157 U. S. 372, distinguished..... 17
Richmond v. Irons, 121 U. S. 27, 48..... 19
Runner v. Dwiggins, 147 Ind. 238, 46 N. E. 580..... 22
Silberschein v. United States, 266 U. S. 221, distinguished.... 17
State v. Superior Court, 170 Wis. 385, 175 N. W. 927, 928.... 8
State ex rel. Stone v. Union Stock Yards State Bank, 103 Ia. 549, 70 N. W. 752, distinguished..... 21
United States v. Chamberlin, distinguished, 219 U. S. 250....15, 19
United States v. George, 228 U. S. 14.....10, 16
United States v. First National Bank, 234 U. S. 245, 260.... 26
Williams v. United States, 138 U. S. 514, distinguished..... 17
Wilson v. Book, 13 Wash. 676, 43 Pac. 939..... 22

IN THE

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J. R. WHEELER, Petitioner,

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HOWARD GREENE, Receiver of the Bankers Joint Stock Land Bank of Milwaukee, Wisconsin.

ON CERTIORARI TO C. C. A. 7TH CIRCUIT.

PETITIONER'S REPLY BRIEF.

MAY IT PLEASE THE COURT:

The respondent asserts that

> "the *administrative* powers of the Farm Loan Board are so comprehensive as necessarily to include the assessment and collection of the stockholders' liability." (Points I and II, pp. 7-26.)

These "administrative powers," it is said, are granted the Federal Farm Loan Board by sections 641, 651, 831(i) and 831(j) of the United States Code. This argument, repeated over and over again, constitutes respondent's brief, with the exception of the argument *ab inconvenienti* and the argument based upon cases arising under the National Bank Act. Let us first notice section 641, which is set forth in the margin.[1]

1. "The Act of July 17, 1916 (chapter 245, section 1, Thirty-ninth Statutes, page 360), as amended by Act of March 4, 1923 (chapter 252, section 1), to include Federal intermediate credit banks may be cited as the 'Federal Farm Loan Act.' Its administration shall be under the direction and control of the Federal Farm Loan Board hereinafter created." (Sec. 641.)

SECTION 641.

This section manifestly contemplates the *administration* of the Act, *not* by the Federal Farm Loan Board, but by *other persons.*

Obviously it means that the persons upon whom other sections cast the duty of *administering* the Act shall be under the direction and control of the Federal Farm Loan Board. We say this for the reason that it would be absurd to provide for the administration of the Act by the *Federal Farm Loan Board* under the direction and control of the *Federal Farm Loan Board.*

From the foregoing logical construction of section 641, important conclusions follow:

1. Since these persons are administering the **Act**, the act itself must be looked to in order to ascertain their powers and duties.

2. The only powers conferred upon the Federal Farm Loan Board by section 641 are purely *supervisory* powers. Under section 641 the aforesaid Board can merely direct and control the persons charged with the *administration* of the Act, *in the performance of the duties imposed, and the exercise of the powers conferred, upon such persons by the Act.*

3. All other powers of the Board—that is, *non-supervisory* powers—must be found in other sections of the Act, since only *supervisory* powers are granted by section 641.

The foregoing conclusions are implicit in the wording of section 641, and necessarily follow from the nature of administrative powers. Discussing the distinction be-

tween legislative power and *administrative* power, the Court in

Brazell v. *Zeigler*, 26 Okla. 826, 110 Pac. 1052, 1054-5,

said:

> "Tested by the rule that municipal legislation consists of prescribing by the lawmaking power of the municipality a rule of civil conduct, was the board in making the order making law or *was it administering or executing a law already made?* If it was making law it was exercising legislative function and the result of its act was municipal legislation. *If it was administering a law already made it was exercising administrative function,* and the result of its act not municipal legislation, *but administrative action;* for, as stated by Mr. McQuillan in his work on Municipal Ordinances, § 80, '*executive and administrative duties are such as concern the execution of existing laws.*' While no doubt, as stated in *Chaska Co.* v. *Super., etc.*, 6 Minn. 204 (Gil. 130), 'boards of county commissioners are public corporations, invested with subordinate legislative powers, to be exercised for local purposes connected with the public good (citing Comp. Stat. 153, § 6; 2 Kent's Com. 309),' it is clear that by so doing the board was administering or carrying into execution law already made, and that too not by themselves, but prescribed by the Legislature of the state. * * * It will thus be seen that in calling for bids for the construction of a bridge at a certain point the board was not legislating or making law, *but was administering law already made, and in so doing were, in effect, acting administratively and with administrative discretion, and this has been so held.*"

For sections imposing duties upon persons charged with the *administration* of the Act, subject to the *supervisory* power of the Federal Farm Loan Board, see sections 651, 656, 672, 673, 674, 743, 751, 752, 753-56, 761, 771, 781, 791, 801-8, 814-23, 841-44, 851-56, 861, etc.

Sections other than section 641 must be looked to for the *direct*, or *non-supervisory* powers of the Federal Farm Loan Board.

Since the persons charged with *administering* the Act must administer "law already made," and since under section 641 the Federal Farm Loan Board can merely direct and control these persons in the performance of their duties *as specified in and by the Act*, it necessarily follows that in order to determine whether the aforesaid Board has the power *under section 641* to direct the receiver to enforce shareholders' liability, we must ascertain *whether any other section* of the Act *makes* it the *duty* of the *receiver* to *enforce shareholders' liability*. If any other section does, then the Federal Farm Loan Board would have the power to direct and control him in the performance of that duty. *If, however, no section imposes that duty upon him*, then the power of the Federal Farm Loan Board to direct him to enforce shareholders' liability would *not* exist as a *supervisory* power under *section 641*.

The only relevant sections are sections 961 and 963, which provide for the appointment of a receiver for joint-stock land banks. The relevant part of section 961, which § 963 makes applicable to joint-stock land banks, is set forth in the margin.[2]

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2. "Such receiver, under the direction of the Federal Farm Loan Board, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, with the approval of the Federal Farm Loan Board, or upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like approval or order, may sell all the real and personal property of such association, on such terms as the Federal Farm Loan Board or said court shall direct." (Sec. 961.)

As pointed out in our main brief, shareholders' liability runs to creditors, and is not an asset of a joint-stock land bank, nor a debt or claim belonging to it.

Section 961 does not impose any direct, primary duty upon a receiver to enforce shareholders' liability; consequently the Federal Farm Loan Board cannot have any *supervisory* power in the premises by virtue of section 641.

And, of course, it is idle to contend that section 641 expressly confers upon the Federal Farm Loan Board the power either to assess shareholders or to direct that a receiver enforce shareholders' liability. The power of the *Federal Farm Loan Board* to assess shareholders would be, not a *supervisory,* but a *direct,* or non-supervisory power. The power to direct a receiver to enforce shareholders' liability might be granted either as a supervisory or as a direct power. However, section 641 grants the Federal Farm Loan Board only *supervisory* powers; and since the power to direct a receiver to enforce shareholders' liability was not granted the aforesaid Board as a supervisory power, in view of the fact that no other section imposes a duty upon a receiver to enforce that liability, it necessarily follows that the contention of respondent is untenable so far as section 641 is concerned.

SECTION 651.

Section 651 is set forth in the margin.[3]

This section bears out our construction of Section 641. (Pp. 1-3, *supra.*) It charges the Federal Farm *Bureau* with the *execution* of the Act—that is, its *administration*—and gives the Federal Farm Loan *Board* only *supervisory,* as distinguished from *direct* or immediate, powers. The respondent does not claim in his brief that any section of the Act clothes the Federal Farm Loan *Bureau* with power either to assess shareholders or to direct a receiver to enforce shareholders' liability. Neither does he allege in his complaint that the aforesaid *Bureau* either assessed the shareholders of Milwaukee Joint Stock Land Bank, or directed respondent to sue petitioner. On the contrary he expressly predicates his alleged ownership or power to represent the alleged cause of action sought to be enforced upon the act of the Federal Farm Loan *Board.*

It follows, therefore, that the alleged power of the Federal Farm Loan *Board* to assess shareholders or to direct the *respondent* to enforce shareholders' liability cannot derive from Section 651. This section confers upon the aforesaid *Board* merely *supervisory* powers over the Federal Farm Loan *Bureau.* And since there is no section that imposes the duty upon the *Bureau* to assess shareholders or to direct a receiver to sue, and there is no claim that the *Bureau* has ever taken any ac-

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3. "There shall be established at the seat of government in the Department of the Treasury a bureau charged with the execution of this chapter, and of all acts amendatory, to be known as the Federal Farm Loan Bureau, under the general supervision of a Federal Farm Loan Board." (Sec. 651.)

tion in the premises, it necessarily follows that Section 651 does not confer upon the Federal Farm Loan *Board* the power to assess shareholders or to direct a *receiver* appointed by it to enforce shareholders' liability.

There is an obvious difference between *supervisory* and non-supervisory powers. Other persons must be under a duty to act before merely *supervisory* powers can be called into play, or have any significance. For instance, as we write, four umpires, under the general supervision of Judge Landis, are performing their duties in the World's Series. The players of both teams are performing their duties under the general supervision of their respective managers.

Section 651 has no bearing upon this case, because it confers upon the Federal Farm Loan Board merely supervisory powers, not over *receivers,* but only over the Federal Farm Loan *Bureau,* and because the *Act* nowhere imposes upon the aforesaid Bureau any duty with respect to the assessment of shareholders or the enforcement of shareholders' liability.

SECTION 831 (i).

This section provides that the Federal Farm Loan Board shall have power:

> "To exercise general *supervisory authority* over the Federal land banks, the national farm loan associations, and the *joint-stock land banks* herein provided for."

This section confers merely *supervisory* authority over the *banks* and *associations* provided for by the Act. What have *they* to do with assessing shareholders or enforcing shareholders' liability?

Article 7, Sec. 8 of the Wisconsin Constitution gives circuit courts "supervisory control" over inferior courts.

In

> *State* v. *Superior Court*, 170 Wis. 385; 175 N. W. 927, 928,

the Court held that under that provision the circuit courts had the power to compel inferior courts *to act within their jurisdiction, to prohibit them from acting without their jurisdiction, and to reverse their extrajurisdictional acts,* independently of the appellate jurisdiction of the circuit courts over such inferior courts.

And that is precisely the power that Section 831 (i) confers upon the Federal Farm Loan Board over the *banks* and *associations* provided for in the Act. The supervisory power thereby granted the Board is limited to the aforesaid *banks and associations.* It does not extend either to stockholders, or to receivers. Neither can it possibly include the power to assess *shareholders,* or the power to enforce shareholders' liability. This liability is not to the banks and associations but to *creditors.* And the banks and associations have no powers, nor duties, with respect to the liability of the shareholders in the performance of which they can be supervised by the Federal Farm Loan Board.

SECTION 831 (j).

This section provides that the Federal Farm Loan Board may

> "exercise such incidental powers as shall be necessary or requisite to fulfill its duties and carry out the purposes of this Chapter."

This section was so fully discussed in our main brief that further discussion of it is unnecessary.

The respondent has not mentioned even *one* duty, or power of the Board, or purpose of the Act, to which the power of the Board to enforce shareholders' liability to creditors is necessary or requisite.

We have shown that Sections 641, 651 and 831 (i) confer upon the Federal Farm Loan Board merely *supervisory* powers, and that Section 831 (j) confers *incidental* powers.

The respondent has lumped these powers together and called them *administrative* powers. It is true that in a sense they are administrative powers, but in so lumping them one is liable to lose sight of the doubly limited nature of *supervisory* powers and *incidental* powers. Supervisory powers presuppose the existence of duties to be performed by other persons—in this case those who are engaged in administering the Act. *Incidental* powers presuppose one or more *primary* powers or duties.

The respondent argues that the *administrative* powers conferred upon the Federal Farm Loan Board by means of the sections above mentioned are so broad that they necessarily include the power to enforce shareholders' liability. We have already seen that this argument is unsound. It is also based upon a misconception of the very nature of *administrative* powers.

Administrative powers and duties always concern *existing laws*—laws made by Congress, etc.,—*which alone confer the powers and impose the duties.* The vice of the respondent's argument is that the Federal Farm Loan Act nowhere authorizes the Federal Farm Loan Board to assess shareholders or to enforce shareholders' liability, and that consequently the Board's attempt to do so was an unlawful exercise of *legislative,* as distinguished from *administrative,* powers.

The limited nature of administrative powers has frequently been pointed out by this Court. In

United States v. *George*, 228 U. S. 14,

the defendant in error had been indicted for perjury under Section 5392 of the Revised Statutes and Section 2291, as amended. Section 5392 is set forth in the margin[4]. The indictment charged that the defendant in error falsely and corruptly took his solemn oath in a proceeding wherein a law of the United States authorized an oath to be administered before the register of the United States land office at North Platte, Nebraska, the proceeding being the making of proof and final entry of a homestead claim.

> "The indictment charges that defendant took an oath and subscribed the same and deposed thereby that he built a house and other improvements on the land, which he described and stated their value to be $300.00, and established his residence thereon in April, 1901. The dimensions of the house and other improvements were stated. He further deposed that he had continuously resided on the land after he had established his residence thereon, and his family after his marriage in 1902, with the exception of certain absences which were stated.
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> * * * * *
>
> "Defendant demurred to the indictment and stated as grounds thereof (1) that it failed to state

4. "Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished, etc."

or charge any crime under the laws of the United States. (2) That there was no law of the United States which required defendant, as claimant, in making his homestead proof, to testify with reference to the matters and things set forth in the indictment, the law of the United States requiring that the facts be proved by two credible witnesses other than the claimant, and did not authorize the claimant to testify in his own behalf with reference thereto.

"The demurrer was sustained, and the case was then brought here under the Criminal Appeals Act.

* * * * *

"* * * Section 2291 is certainly a necessary if not a determinative element in that consideration. It provides as follows: '* * * If * * * the person making such entry * * * proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years * * * and makes affidavit that no part of such land has been alienated * * * and that he, she or they will bear true allegiance to the Government of the United States; then, in such case, he, she or they * * * shall be entitled to a patent.' It will be observed that the facts required to be proved are stated, by what means proved, and the manner of proof and its quantum. The facts to be proved are (1) cultivation of and residence upon the land and (2) non-alienation and allegiance; the means of proof of the first being two credible witnesses; of the second, affidavit of the claimant. In other words, the section is not only explicit as to what is to be proved but in what manner proved; and what is required of the claimant himself, to-wit, an affidavit, is distinguished from what he must establish by others, to-wit, two credible witnesses. *Such, then are the conditions, seemingly legislatively made the exact measure of the obligation of the homestead claimant.* It certainly will not be asserted that they can be detracted from. *It is asserted that they may be added to, and have been*

added to by virtue of certain sections of the Revised Statutes. We insert the sections in the margin.[5] *It will be seen that they confer administrative power only.* This is indubitably so as to Secs. 161, 441, 453 and 2478; and certainly under the guise of regulation legislation cannot be exercised. *United States*

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5. "Sec. 161. The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of this Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

"Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

* * * * * *

"Second. The public lands * * *

"Sec. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

"Sec. 2246. The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands; but he shall not charge or receive, directly or indirectly, any compensation for administering such oath.

"Sec. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for."

v. *United Verde Copper Co.*, 196 U. S. 207. Especial stress, however, is put upon Sec. 2246. By that section the register or receiver is authorized and it is made his 'duty to administer any oath required by law or the instructions of the General Land Office in connection with the entry or purchase of any tract of land.' These sections, it is contended, as we have seen, were the law of the indictment.

"Acting under the authority presumed to be given by Sec. 2246 and the other sections, a regulation was promulgated which prescribed forms of taking preemption and final homestead proof by questions and answers, and provided that 'the claimant will be required to testify, as a witness, in his own behalf in the same manner.' It was testimony exacted in pursuance of this regulation and in the manner directed by it which constitutes the charge of the indictment. It will be observed, therefore, that the claimant was required to testify as other witnesses. In other words, three witnesses were required; Sec. 2291 requires two only and, as we have said, points out what proof, in addition, the claimant himself shall give. *It is manifest that the regulation adds a requirement which that section does not, and which is not justified by Sec. 2246. To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what Sec. 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the Government and given to the discretion of the Land Department? It is not an adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given at all it is as broad as its subject and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the statute.*

"In *United States* v. *United Verde Copper Co.*, *supra*, this court considered the power of the Secretary of the Interior under an act of Congress giving the right to cut timber from the public lands for

certain purposes, which were enumerated 'or domestic purposes,' and making the right subject to such rules and regulations as the Secretary of the Interior might prescribe 'for the protection of the timber and of the undergrowth growing on such lands, and *for other purposes.*' (Italics ours.) The Secretary made a regulation which provided, among other things, that no timber should be 'permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.' The justification urged for the regulation was that the word 'domestic' meant household. This court rejected the contention and decided that the regulation transcended the power of the Secretary. We said, *If Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.'*

"In that case the power of the Secretary of the Interior was directly associated with the right conferred. Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative function was recognized and enforced. And, similarly, this distinction must be recognized and enforced in the case at bar. The distinction is fundamental. Where the charge is of crime, it must have clear legislative basis. In illustration we may cite *Williamson* v. *United States,* 207 U. S. 425; *United States* v. *Keitel,* 211 U. S. 370; *United States* v. *Eaton,* 144 U. S. 677; *Morrill* v. *Jones,* 106 U. S. 466; *United States* v. *Briggs,* 211 U. S. 507; *Dwyer* v. *United States,* 170 Fed. Rep. 160.

Judgment affirmed."

Obviously, the power to *administer* an Act, or to supervise others in *their* administration of an Act, is limited by the Act itself. Otherwise, we should have a government, not of laws, but of men. The rule that not to grant powers is to prohibit them, would not exist.

And since the Federal Farm Loan Act nowhere authorizes the Federal Farm Loan *Board* or the Federal Farm Loan *Bureau*, or the *receiver*, or joint-stock land banks to enforce shareholders' liability, it necessarily follows that the Federal Farm Loan Board's attempt to do so is an unwarranted usurpation of *legislative* power. The power to enforce shareholders' liability cannot exist either as an *administrative*, or as a *supervisory* power. This is especially true, in view of the fact that the mere creation of the shareholders' liability without more gave creditors the power to enforce it. (Cases cited on p. 19, *infra.*)

CASES CITED BY RESPONDENT DISTINGUISHED.

The respondent is guilty of a lack of frankness in his use of the case of

United States v. *Chamberlin*, 219 U. S. 250.

The principal question involved in that case was whether the United States could maintain an action of debt to recover stamp taxes payable under the War Revenue Act of June 13, 1898. The Court pointed out that *"if the statute creates an obligation to pay the tax, and does not provide an exclusive remedy, the action must be regarded as well brought."* (P. 258) The Court decided that the statute did create an obligation to pay, and that the penal provisions were not exclusive. The Court then said:

> "We are also of opinion that the statute itself provides that payment may be enforced by action. Section 31 makes 'all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed,' applicable to the act. Within 'administrative' provisions must be included those which relate to the collection of the taxes imposed.

For the administration of the statute may well be taken to embrace all appropriate measures for its enforcement, and there is no substantial reason for assigning to the phrase which is used in the section quoted a narrower interpretation. It therefore comprehends the authority conferred by Sec. 3213 of the Revised Statutes in the following words:

> 'And taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any circuit or district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the action.'

"This provision authorizing suit, with the sanction of the Commissioner of Internal Revenue (Rev. Stat., Sec. 3214), was originally enacted in 1866 (act of July 13, 1866, c. 184; 14 Stat., p. 111) as an amendment of the Internal Revenue act of June 30, 1864, chapter 173 (13 Stat. 239), and included within its scope the stamp taxes then in force. It must be deemed applicable also to the taxes imposed by the act of 1898."

The respondent quoted only the first four sentences of the foregoing excerpt. Of court, his omission of the Court's reference to Section 3213 gave an entirely different meaning to the preceding matter.

It is needless to consider *seriatim* the cases having to do with the General Land office. The statutes granting powers to the Secretary of the Interior and subordinate officials are set forth on p. 12, *supra;* and the limitations upon their powers are indicated in

United States v. *George,* 228 U. S. 14,

cited on p. 10, *supra.* The following cases cited by respondent fall within the category above mentioned:

Cosmos Exploration Co. v. *Gray Eagle,* 190 U. S. 301.

Catholic Bishop of Nesqually v. *Gibbon*, 158 U. S. 155.

Knight v. *United States Land Association*, 142 U. S. 161.

Williams v. *United States*, 138 U. S. 514.

Orchard v. *Alexander*, 157 U. S. 372.

And, of course, it is nothing short of ridiculous to compare the power of the Federal Farm Loan Board to the power of the President under Article 2, Sections 1 and 3, of the Constitution. With respect to the powers of the President under section 3, it has well been said:

> "The President has, under the Constitution and laws, certain duties to perform, among these being to take care that the laws be faithfully executed; that is, that the other executive and administrative officers of the government faithfully perform their duties; *but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from, the duties imposed upon subordinate, executive and administrative officers by the law, than those officers have to add or subtract from his duties.*" 19 Op. Atty. Gen. 686.

The same reasoning applies to the very limited powers of the Federal Farm Loan Board. The trouble with the respondent's whole argument is that he is unable to point to any provision of the Federal Farm Loan Act that gives the Federal Farm Loan Board the power to assess shareholders, or to direct the receiver to enforce shareholders' liability. Neither does the Act confer upon the receiver the power to enforce shareholders' liability upon his own initiative, or impose upon him the duty of doing so whenever directed by anyone else.

The utter irrelevance of

Silberschein v. *United States*, 266 U. S. 221,

which arose under the War Risk Insurance Act, may be

demonstrated by the statement that the *Act* authorized the Director to discontinue compensation which he found to have been erroneously awarded. How can one administer an Act without being bound by it? *Where is the provision of the Federal Farm Loan Act that gives the Federal Farm Loan Board the power to direct the receiver to enforce shareholders' liability? Where is the provision that makes it the duty of the receiver to sue to enforce the liability under any circumstances?*

ENFORCEMENT OF SHAREHOLDERS' LIABILITY.

In his discussion of the enforcement of the liability imposed by Section 812 of 12 United States Code,[6] the respondent attempts to draw a distinction between a statute that expressly provides that shareholders shall be liable to creditors and one that provides that shareholders shall be liable for the contracts, debts and engagements of the bank or other corporation.

There exists no rational ground for any distinction, so far as a receiver's power to enforce shareholders' liability is concerned. The liability imposed by Section 812 of United States Code is "for all contracts, debts and engagements" of the bank to a specified extent. The contracts and engagements of the bank are with *third persons*, and the debts of the bank are due to *third persons*. It necessarily follows that the liability of shareholders for such contracts, debts and engagements runs

6. "Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

to *the persons to whom the bank is obligated,* and *not* to the bank.

The mere creation of the liability or the duty to pay persons holding obligations of the bank gives those persons power to enforce the obligation.

United States v. *Chamberlin,* 219 U. S. 250, 258—cited on p. 15 *supra.*

Richmond v. *Irons,* 121 U. S. 27, 48.

When, therefore, Congress created the liability, it at the same time empowered creditors to enforce that liability. And a receiver of the bank *cannot* enforce it—

1. Because he is not a creditor.

2. Because he is a mere *custodian* of the *bank's assets.*

3. Because the shareholders' liability to *creditors* is not an asset of the *bank.*

4. Because Congress in defining the powers of the Federal Farm Loan Board failed to grant it the power to direct its receivers to enforce shareholders' liability, as Congress had granted the power to the Comptroller to direct his receiver to enforce stockholders' liability to creditors of national banks.

5. Not to grant is to prohibit.

The respondent has cited only three relevant cases that hold that shareholders' liability is a corporate asset. We frankly stated in our main brief that a few states had denied the general rule that shareholders' liability is not a corporate asset. This rule is so generally recognized and enforced that text-writers state it as a rule of law. Of the cases cited by the respondent, the case of

McNeill v. *Pace,* 69 Fla. 349, 68 So. 177,

may well be distinguished because of the wording of the statute. *Unlike the* Federal Farm Loan Act, the Florida

statute does not specify just what the receiver may do, but provides that

> "the comptroller shall *apply to the courts,* in his own name, for the appointment of a receiver *to close up the affairs of such company.*" (P. 178.)

The State Supreme Court held that this broad general power was sufficient to enable the receiver to enforce shareholders' liability. The Federal Farm Loan Act contains no such broad grant of power. Section 961 of 12 United States Code provides that the receiver, under the direction of the Federal Farm Loan Board shall (1) take possession of the bank's assets, (2) collect all debts, etc., belonging to it, (3) sell or compound all bad or doubtful debts, and (4) sell all the real and personal property. Of course, in such a case the rule *expressio unius est exclusio alterius* applies.

Moreover, under the Florida statute the stockholder would have his day in court, since the Comptroller is forced to apply to the *courts* for the appointment of a receiver.

Lastly, in that case there was a dissenting opinion, as follows:

> "I regret my inability to concur in this opinion, especially as it leads to most desirable results; the convenience of having the receiver pursue the stockholders is manifest.
>
> It must, however, be admitted that a large majority of the courts had denied the power under very similar statutes, when our legislation was passed. It is a further fact that the section regulating the liability of stockholders is practically identical, so far as applicable to state banks, with the federal statute, so that it becomes a necessary deduction that our Legislature had the federal law before it when considering this legislation. It is a further fact that the federal statute specifically authorizes

> the receiver to enforce the stockholder's liability. It is fair, then, to assume that the Legislature intentionally omitted this specific power for reasons satisfactory to it, and for these reasons I am unwilling to so construe its action as to correct that omission."

In our case there is absolutely no doubt that the Congress had the National Bank Act before it when the Federal Farm Loan Act was drafted, and that it deliberately refused to grant the Federal Farm Loan Act the power to direct its receivers to enforce shareholders' liability.

The case of

State ex rel. Stone v. *Union Stock Yards State Bank,* 103 Ia. 549, 70 N. W. 752,

is also cited by the respondent. The statute in that case also required that an application be made to the courts for the appointment of a receiver. In this way a stockholder could have his day in court, instead of being subjected to Star Chamber proceedings.

The case of

King v. *Armstrong,* 50 Ohio St. 222, 34 N. E. 163,

cited by respondent arose under the National Bank Act.

The case of

Hynes v. *Illinois Trust & Savings Bank,* 226 Ill. 95, 80 N. E. 472

cited by the respondent has absolutely no relevancy to the facts in the case at bar. The receiver in that case was appointed under Section 25 of the then Corporation Act in a suit by a judgment creditor against the corporation and a stockholder to collect the amount due on unpaid stock subscription. Section 25 expressly authorized the receiver to sue if ordered to do so by the court. (See p. 27, *infra* for Section 25 of the then Corporation Act.)

Moreover, the power of the receiver to maintain the suit was not even discussed. The whole case turned upon the right of set-off.

The other case cited by respondent is

Wilson v. *Book*, 13 Wash. 676, 43 Pac. 939.

In that case, *too*, the receiver was appointed by a court, so that a stockholder would have his day in court. No sound reason is given by the Supreme Court for the rule adopted. The liability was admittedly created for the benefit of creditors; and the mere creation of the liability gave creditors the power to enforce it. Only by means of an express provision could a receiver be given that power.

In each of the following cases it was held that a receiver could not enforce stockholders' liability, although the statute imposing it did not expressly provide that stockholders should be liable to creditors:

Colton v. *Mayer*, 90 Md. 711, 45 Atl. 874;
Hammond v. *Cline*, 170 Ind. 452, 84 N. E. 827;
Runner v. *Dwiggins*, 147 Ind. 238, 46 N. E. 580;
Clapp v. *Smith*, 22 N. M. 153, 159 Pac. 523;
Brown v. *Trail*, 89 Fed. 641.

Like the Federal Farm Loan Act, the statutes in those cases provided merely that stockholders should be liable for the contracts, debts and engagements of the corporation.

The fact is that Congress did not intend that the Federal Farm Loan Board should have the power to enforce shareholders' liability to creditors. It gave that power to creditors. It failed to grant it to the Board, as well as other cognate powers that had been granted to the

Comptroller in and by the National Bank Act. (12 U. S. C. 191-200.) And it specified precisely what powers the Board should have. All others were accordingly prohibited.

There were valid reasons why the powers that were expressly granted to the Comptroller should be withheld from the Federal Farm Loan Board. The United States have no direct liability or pecuniary interest in joint-stock land banks, such as they have in national banks. (See main brief, pp. 89-90.) Only because the National Bank Act expressly authorized the Comptroller to enforce stockholders' liability (which was due to the pecuniary interest and the liability of the United States) did this Court hold that stockholders in national banks were not entitled to a day in court. Deprivation of a day in court should never rest upon mere inference. The intention of Congress not to grant a shareholder a day in court should be expressed in words that leave no doubt about the matter, just as it was in the National Bank Act.

LEGISLATIVE METHOD.

On pages 27, 28 of respondent brief it is said that there has been a change in legislative method since 1864, when the National Bank Act was passed. Respondent then asserts:

> "Examined in the light of this change in the method of legislating, it will be seen that what was accomplished by one method under the National Bank Act (the vesting of power in the comptroller *by a series of specific details*) was accomplished in the Farm Loan Act by a different method (*the vesting in the Farm Loan Board of broad administrative and supervisory authority.*)

We have seen that the administrative and supervisory powers granted the Federal Farm Loan Board do not and cannot include the power to enforce or to direct anyone else to enforce shareholders' liability.

The alleged difference in method also exists only in the assertion of respondent. The following sections of 12 United States Code vest powers in the Federal Farm Loan Board: 641, 651, 656, 657, 658, 659, 662, 663, 664, 671, 672, 673, 675, 676, 678, 679, 681, 683, 691, 694, 695, 713, 714, 718, 719, 721, 741, 743, 754, 755, 761, 771, 781, 815, 817, 818, 822, 823, 831, 841, 842, 843, 844, 853, 856, 861, 862, 864, 871, 872, 876, 878, 879, 881, 882, 884, 893, 914, 951, 952, 953, 961, 962, 963, 964, 972, 973, and 1001.

Talk about a series of specific details! And the Act descends into the very minutest detail, with never even a hint of the important power to enforce shareholders' liability to creditors.

From the argument of respondent one unfamiliar with the Federal Farm Loan Act would infer that the few sections mentioned by respondent were the only ones that conferred any powers upon the Federal Farm Loan Board, when as a matter of fact they are only a few relatively unimportant sections of the 68 sections above mentioned that confer powers upon the aforesaid Board. *Nothing* is left to implication. The multiplicity and certainty of the powers granted leave no room for doubt concerning what powers Congress intended to grant, even if the rule *expressio unius est exclusio alterius* be disregarded.

On page 42 *et seq.* the respondent argues that the power to enforce shareholders' liability is of such vital importance that Congress must necessarily have intended

to grant it to the Federal Farm Loan Board. Why, then, wasn't the power expressly granted? It would have been easy to say so, if Congress had intended to grant the power; and the very importance of the power is some proof that it was not overlooked by Congress, to say nothing of the fact that the language of a parallel section of the National Bank Act was closely followed down to the clause that expressly granted the power to enforce stockholders' liability, when there was a significant omission.

The remainder of respondent's brief is largely a repetition of the argument based upon the administrative powers of the Board, the argument *ab inconvenienti*, and argument based upon cases arising under the National Bank Act. The brief deals in generalities and assertions that certain things must necessarily be so, although the respondent is unable to support his assertions either by reference to the Federal Farm Loan Act, or by any ratiocinative process worthy of the name. In effect he advocates a new method of legislation. All that Congress needs to do is to create boards and confer *administrative* powers upon them. These boards can then do anything that may seem to them to be expedient or desirable,—a compendious method that dispenses with both legislative discretion and judicial functions. All government is remitted to an omniscent and omnipotent bureaucracy.

We submit that there is no warrant in the existing law, as distinguished from the will of the Federal Farm Loan Board, for the claimed power.

The statement of counsel that if respondent's construction is not adopted it will be necessary to institute ancillary suits in thirty states, is without any support in the record.

It is needless to waste the time of this Court in answering respondent's argument *ab inconvenienti*. The claimed power either exists or it does not exist. If Congress granted the power, all talk about convenience is beside the case. If Congress withheld the power, this Court cannot grant it; and all talk about hardship is futile. As said in

United States v. *First National Bank*, 234 U. S. 245, 260:

> "If the true construction has been followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice and wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws."

We submit that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully,

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APPENDIX.

HURD'S ILLINOIS REVISED STATUTES, 1917.

25. Suits against stockholders.) § 25. If any corporation or its authorized agents shall do, or refrain from doing any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record, for a payment of money, after demand made by the officer, to be returned "No property found," or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way, for the debts of the corporation, by joining the corporation in such suit; and each stockholder may be required to pay his pro rata share of such debts or liabilities to the extent of the unpaid portion of his stock, after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders. And courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor who shall have authority, by the name of the receiver of such corporation (giving the name), to sue in all courts and do all things necessary to closing up its affairs, as commanded by the decree of such court. Said receiver shall be, in all cases, a resident of the state of Illinois, and shall be required to enter into bonds, payable to the People of the State of Illinois, for the use of the parties interested, in such penalty and with such securities as the court may, in the decree or order, appointing the same require. In all cases of suits for or against such receiver, or the corporation of which he may be receiver, writs may issue in favor of such receiver or corporation, or against him or it, from the county where the cause of action accrued to the sheriff by act approved in this state for service. (As amended by act approved May 22, 1877. In force July 1, 1877, L. 1877, p. 66; Legal News Ed., p. 72.)